J.M.A. Holdings, Inc. *and* United Food and Commercial Workers Union, Local 770, United Food and Commercial Workers International Union, AFL–CIO, CLC. Case 21–CA–27688

May 12, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On August 19, 1992, Administrative Law Judge George Christensen issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We adopt the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) of the Act when it failed to reinstate economic strikers immediately on the Union's unconditional offer on their behalf to return to work. During the strike, the Respondent hired 39 employees to perform the work of the striking employees. The record shows that it was the Respondent's policy to advise replacement employees that they were being hired on a permanent basis. The record further shows that this policy was communicated to and relied on by numerous replacement employees. In addition, on July 24, 1990, prior to the strikers' unconditional offer to return to work that afternoon, the Respondent posted a notice to ''All Recently Hired Employees'' stating that they were ''being made permanent employees.'' At no time did the Respondent indicate to the replacement employees that they were being hired on a temporary basis, or that their employment would be terminated at the end of the strike. Under these circumstances, we find that the employees hired to replace the strikers are permanent employees. See *Solar Turbines*, 302 NLRB 14 (1991).

In so finding, we reject the General Counsel's contention that the replacement employees had not ''accepted'' permanent employment at the time of the unconditional offer because they had not completed the employment application, physical, and drug test. The Respondent informed employees that they could complete these steps of the hiring process as their work schedule permits, and that if they fail to pass the physical they will be ''terminated.'' The replacement employees accepted permanent employment at the time they agreed to work for the Respondent, and followed through on this commitment by coming to the Respondent's plant and working. As in *Solar Turbines*, supra, the completion of the application, physical, and drug test were not preconditions to permanent employment.

Reiterating the minority view he set forth in *Solar Turbines*, our dissenting colleague asserts that no firm commitment to hire can occur until the applicants have successfully completed the ''pre-employment'' physical examination and drug testing, and that any earlier job offer is merely conditional. In accord with the majority opinion in *Solar Turbines*, we find that a firm commitment to hire the replacements as permanent employees occurred at the time they accepted the Respondent's job offer, despite the fact that they were later informed that in order to continue their employment, they had to complete a physical examination and drug testing ''over the next few weeks as the normal work schedule permits.''

Further, we find no merit to the General Counsel's suggestion that the three striker replacements who started work on July 25 were not hired prior to the strikers' unconditional offer to return to work. The record shows that each of these employees was offered and accepted permanent employment during conversations with Plant Manager Peter Gutierrez on the morning of July 24, prior to the Union's unconditional offer on behalf of the strikers to return to work.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER DEVANEY, dissenting in part.

Contrary to my colleagues, I find that the Respondent had not hired permanent replacements for the economic strikers prior to the strikers' unconditional offer to return to work, and that the Respondent's failure to reinstate the strikers therefore violated Section 8(a)(3) and (1). I find that the Respondent, within hours before the strikers' offer to return, had informed the replacements of its intention to convert them to permanent status, and that the conditions for such conversion had not been satisfied at the time of the strikers' offer.

The essential facts are not in dispute. After its employees began an economic strike on July 19, 1990,[1]

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In quoting the Respondent's July 24 notice to striking employees in sec. II,A,13, par. 2 of his decision, the judge inadvertently omitted the words ''a job'' in the last line of the last paragraph between ''when'' and ''opening exists.''

[1] All dates are 1990 unless otherwise indicated.

the Respondent commenced hiring replacements. The administrative law judge found that, when asked, the Respondent consistently informed the strikers and the replacements that the latter were permanent employees. During the strike, 39 new employees were offered employment, of whom 36 began work before the strikers offered to return and 3 began work the next day. On July 24, shortly before receiving the strikers' offer, the Respondent posted and distributed to the replacements a memo entitled ''Permanent Employment.'' The memo stated in pertinent part: ''All employees who have been hired during the current work stoppage are being made permanent employees. All such employees will be required to pass the company's pre-employment physical, which includes drug screen, and to complete all other parts of the normal hiring process. Any employee who fails to pass the physical will be terminated.'' According to the memo, the physicals were to be scheduled during the next few weeks.

The established standard for assessing whether strikers have been permanently replaced is that ''if the employer makes a commitment to the applicant for a striker's job, we will normally regard that commitment as a legitimate replacement even though the striker requests reinstatement before the replacement actually begins to work.'' *H. & F. Binch Co*., 188 NLRB 720, 723 (1971), enfd. in relevant part 456 F.2d 357 (2d Cir. 1972). However, as I stated in my dissent in *Solar Turbines*, 302 NLRB 14 (1991), where an employer's hiring practice requires applicants to successfully undergo preemployment screening, such as physical examination or drug testing, no firm commitment to hire can occur until these requirements have been completed and the employer has received the results, so that the employee is free to begin work. Any earlier job offer is merely conditional, and cannot serve to deprive an economic striker of reinstatement based on an unconditional offer to return to work.

In the present case, most of the replacements clearly began work in some capacity before the strikers' offer to return. Unlike the judge and the majority, however, I am not persuaded by the Respondent's facile representations to its new hires that they were employed on a permanent basis. In *Solar Turbines*, I found that such ''magic words'' were not sufficient to demonstrate a real commitment by the employer. Instead, it is essential to evaluate the actual quality of the offer based on all of the facts and within the context of the employer's normal hiring practice. In this case the Respondent's assurances are plainly belied by its July 24 memo announcing that the replacements were ''being made permanent employees.'' Certainly, no such conversion would be necessary if the Respondent itself viewed the new hires as permanent employees from the start.

Moreover, the July 24 memo sets out certain conditions for continued employment, including a ''pre-employment'' physical examination and drug screen, which the Respondent characterizes as part of its ''normal hiring process.''[2] The Respondent's apparent initial failure to inform the replacements of these requirements does not negate their existence as conditions of permanent hire. There is no evidence in the record that the Respondent waived these conditions with respect to the replacements. To the contrary, the memo expressly conveys the Respondent's intention to enforce the requirements and to terminate any new hires who do not satisfy them. On the same day that the memo was distributed, however, before any of the replacements could have removed the conditions and been converted to permanent status, the economic strikers unconditionally offered to return to work. Therefore, considering all of the circumstances of this case, rather than focusing narrowly on the Respondent's self-serving statements during the strike, I find that the Respondent has failed to demonstrate that the strikers were permanently replaced, and I would order reinstatement and backpay for those strikers who were denied reinstatement upon their offer to return to work because their positions were occupied by newly hired employees.

[2] This case is distinguishable from *Kansas Milling Co*., 97 NLRB 219 (1951). In that case, the Board found that striker replacements who were required to complete a 30-day probationary period and successfully did so were permanent employees ab initio. Unlike a probationary period, which must necessarily be completed after hire, the testing at issue here was, by the Respondent's own description, within the Respondent's ''pre-employment'' procedure.

Frank Wagner, Esq., for the General Counsel.
Stanley E. Tobin and *James A. Bowles, Esqs. (Farrer & Burrill)*, of Los Angeles, California, for the Respondent.
Henry M. Willis, Esq. (Steinsapir, Dohrmann & Sommers), of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On July 9 through 17, 1991, I conducted a hearing at Los Angeles, California, to try issues raised by a complaint issued on April 25, 1991, based on a charge filed by United Food and Commercial Workers Union, Local 770, United Food and Commercial Workers International Union, AFL–CIO, CLC on August 24, 1990.[1]

The complaint alleged and J.M.A. Holdings, Inc. (Respondent) denied the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by creating the impression among employees the Respondent was surveilling the employees' union activities, threatening employees with plant closure, lower wages, and discharge if they selected Local 770 as their bargaining representative, interrogating employees about their and other employees' union member-

[1] Read 1990 after further date references omitting the year.

ship, activities, and sympathies, telling employees it was unlawful to engage in a strike, notifying striking employees if they made unconditional offers to return to work they would only be considered for future job openings, and notifying strikers who made unconditional offers to return to work they would only be reinstated to future job openings.

The complaint also alleged and the Respondent denied the Respondent's alleged unfair labor practices caused or prolonged the strike; named strikers unconditionally offered to return to work; and that the Respondent violated Section 8(a)(1) and (3) of the Act by failing to offer those named strikers immediate reinstatement. The complaint further alleged and the Respondent denied, presuming the strike in question was an economic strike, the Respondent violated Section 8(a)(1) and (3) of the Act by failing to reinstate strikers who had not been permanently replaced.

Finally, the complaint alleged and the Respondent denied Martin Estrada at pertinent times was a supervisor and agent of the Respondent acting on its behalf within the meaning of Section 2 of the Act.

The issues created by the foregoing are whether:

1. At pertinent times Estrada was a supervisor and agent of the Respondent acting on its behalf within the meaning of Section 2 of the Act.

2. The Respondent committed the acts alleged as violations of Section 8(a)(1) of the Act and, if so, thereby violated Section 8(a)(1).

3. The alleged violations of Section 8(a)(1), if committed, caused or prolonged the strike.

4. Strikers named in the complaint unconditionally offered to return to work.

5. The Respondent failed or refused to immediately reinstate those strikers, thereby violating Section 8(a)(1) and (3) of the Act.

6. In the event the strike was economic, the Respondent failed or refused to reinstate strikers who had not been permanently replaced, thereby violating Section 8(a)(1) and (3) of the Act.

The General Counsel, Local 770, and the Respondent appeared by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. All three filed briefs.

Based on my review of the entire record,[2] observation of the witnesses, perusal of the briefs, and research, I enter the following

FINDINGS OF FACT[3]

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer admitted, and I find at all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce and Local 770 was a labor organization within the meaning of Section 2 of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Background

The Respondent corporation was formed and wholly owned by Baker Commodities, Inc. At pertinent times Baker consisted of five corporations, four wholly owned subsidiaries (including the Respondent), and a 50-percent interest in three other corporations. Baker's operations were in 23 different localities, including Seoul, Korea, and Tijuana, Mexico. Baker was primarily engaged in the rendering business, purchasing grease and animal products from restaurants, groceries, slaughterhouses, etc., processing and selling those products and vegetable oils. Baker was party to approximately 14 collective-bargaining agreements with various unions, including Local 770, other affiliates of UFCW, and affiliates of IUOE, ILWU, and IBT.

In 1980 Baker purchased a slaughterhouse adjacent to its headquarters and a plant in Vernon, California. Baker leased the slaughterhouse to Serv-U Meats, which purchased and slaughtered cattle and sold the meat products. Serv-U ceased business when its owner died; Baker subsequently leased the slaughterhouse to Stockton, a custom slaughterer.[4]

Baker subsequently leased the slaughterhouse to a succession of custom slaughterers who were unprofitable and ceased doing business. There were substantial periods between tenancies when the slaughterhouse was unused. In view of the foregoing, Baker finally decided (1986) to try its hand at operating as a custom slaughterer in the building, after extensive building improvements. Baker formed the Respondent corporation with the same officers as its parent, i.e., James Andrioli, president; Raymond Kelly, executive vice president, operations; William Sikes, vice president, production; and Mitchell Ebright, secretary, vice president, and general counsel.

Between its 1986 formation and April 1989, the Respondent negotiated contracts with several meat packers to custom kill their cattle, including Delta, Acme, and Globe.

At that time, Baker employees in the building adjacent to the slaughterhouse were represented by Local 563 of the UFCW[5] and in 1987, in a conversation with Kelly, a representative of Local 563 stated the International Union wanted Local 563 to organize the Respondent's employees but he resisted, in the belief Local 563 could not win a Board-conducted election among the Respondent's employees.

The meatpackers who contracted with the Respondent between 1986 and 1989 were succeeded in April 1989 by Federal Meat Packing Co., after a period the Respondent had no slaughtering to perform and its preexisting work force had been laid off. [6]

In view of the declining business, Federal was only willing to enter into short-term contracts; the initial contract was en-

[2] Counsel for the General Counsel's posthearing motion to correct the transcript is granted, and certain errors have been noted and corrected.

[3] Although every apparent or nonapparent conflict in the evidence has not been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony; therefore, any testimony in the record which is inconsistent with my findings is discredited.

[4] A custom slaughterer butchers cattle it does not own on a per-head basis, delivering the products to the cattle owner.

[5] Local 563 later became Local 770 by merger or succession.

[6] By that time only 2 of the approximately 17 meatpackers with previous operations in the Vernon area were still in business; Federal and Shamrock.

tered into in April 1989 for a 3-month period with options for renewal for two successive 6-month periods. Federal exercised the first option but, by mutual agreement, at the end of that period the two contracted first, for a 2-month extension, then a 3-month period and finally day to day, until Federal ceased doing business entirely in late September 1990.

Because of the uncertainty over how long Federal was going to continue to require the Respondent's services following its entry into contractual relations with the Respondent, the Respondent distributed to its employees and had them read and sign the following document:

> I, the undersigned employee, acknowledge that my recall from layoff or new hire employment by JMA Holding, Inc. is for a limited project. JMA Holding, Inc. is re-opening their slaughter-house as a result of a processing agreement with Federal Meat Company that provides for cancellation at any time with [sic] the first 90 days of kill operations and in two six month increments thereafter. In the event that the processing agreement is terminated for any cause, employee employment will be terminated.[7]

Federal utilized part of the facility, maintained an office there, and had employees there to dress and distribute the processed beef. The Federal employees were represented by Locals 563 and 770 and worked in close proximity to the Respondent's employees (as did Baker employees working next door and represented by Local 563 and 770).

By February 1990, the Respondent employed a work force of approximately 80, plus Peter Gutierrez, general manager; Fernando Pena, assistant general manager; Thomas Alexander, kill floor supervisor; Charles Woodward, chief engineer; and leads Jose Franco, Uriel Banuelos, and Martin Estrada. Sikes spent a substantial amount of time daily directing operations at the facility.[8] Andrioli, Kelly, and Ebright exercised overall control of the Respondent's operations from offices in the adjacent building.[9]

2. Estrada's status

Alexander was salaried, did not punch a timeclock, attended meetings with higher management, received 2 weeks of paid vacation per year, was covered by a health insurance plan, was not paid overtime, and had and exercised power to hire, discipline, and assign work to the kill floor employees.

Neither Alexander nor Sikes, who also oversaw kill floor employees, spoke or understood the Spanish language.

Estrada, who was bilingual, was utilized by Alexander and Sikes to communicate their instructions and orders to kill floor employees (most of the employees were not fluent in and did not understand English, only Spanish).

Estrada was an experienced butcher, capable of performing about 90 percent of the job functions on the kill floor and spent about 90 percent of his time working as a butcher (he and Franco filled in for employees who were either on authorized or unauthorized absence from their regular assignments and changed jobs as work demands altered during the workday).

Each morning Gutierrez and Alexander conferred over what work they expected to accomplish that day and which employees would be assigned for its performance; their decisions were communicated to Estrada, who in turn informed the Spanish-speaking employees of their assignments for the day. Work assignments were often changed, particularly after the lunchbreak, by Gutierrez and/or Alexander, and the same procedure was followed with respect to communicating the changes to Spanish-speaking employees. Estrada trained new employees in their job duties and kept the production lines running smoothly and efficiently, exhorting employees to work faster if and when the workflow slowed down. On occasion, he substituted for Alexander during his absences from the kill floor.

It was customary for casuals to assemble in or near the plant at the start of the shift in the hope they might be offered employment. When the workload indicated a need for additional employees or the number of absentees warranted the hire of temporaries, in view of the fact the casuals were predominantly Spanish speakers Estrada interviewed the casuals, determined which possessed the desired skills, and referred them to the Respondent's secretary for hire.

Estrada was hourly paid, paid for overtime, punched a timeclock, did not attend management meetings,[10] did not hire permanent employees,[11] did not discipline employees,[12] did not evaluate employee work performance,[13] and did not authorize overtime.

Little evidence was developed concerning the functions of the other two leads, Franco and Banuelos, other than Gutierrez' testimony one of Franco's duties was to collect payments from employees for the use of luggers (coats) owned by the Respondent and provided to employees on the kill floor in the form of rentals, plus payments for knives purchased by the employees from the Respondent for use in their work and testimony Banuelos worked with a small group doing cleanup after operations on the kill floor ceased each day.

3. The beginning of Local 770's organizational campaign

The first change from Local 770's 1987 attitude regarding the organization of the Respondent's employees occurred in early 1990, when Local 770 Representative James Rodriguez,

[7] The document was distributed in English and Spanish.

[8] The complaint alleged, the answer admitted, and I find at all pertinent times Sikes, Gutierrez, Pena, Alexander, and Woodward were supervisors and agents of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

[9] I find Andrioli, Kelly, and Ebright at all times pertinent were officers, supervisors, and agents of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

[10] With one exception; when the employees went on strike, Estrada attended one meeting at which those present were instructed on the ''do's and don'ts'' which should govern conduct during the strike.

[11] Though from time to time casuals selected by Estrada for employment were retained as permanent employees when they worked well in jobs which had been vacated and, along with other nonstrikers, Estrada attempted to recruit replacements when the strike started.

[12] Estrada recommended discipline on occasion to Alexander, but either Gutierrez or Alexander reviewed the situation and made the decisions whether to discipline and the extent of the discipline.

[13] Estrada recommended employees who worked well but either Gutierrez and/or Alexander conducted a further review and decided on any change in assignment or wages of the employees in question.

in the course of a conference with Federal President Phillip Bauer,[14] told Bauer Local 770 was going to try to organize the Respondent's employees and Local 770 Organizer Bennie Puente and Respondent employee Rogelio Anguiano established contact, began to meet, and Puente began supplying union authorization cards to Anguiano for distribution to the Respondent's employees and solicitation of signatures thereto.

During this period (early 1990), Anguiano recruited Respondent employees Carlos Beltrano and Theodora Thornton to aid him in distributing the cards and soliciting signatures thereto.[15]

4. The Respondent's awareness of the campaign

Puente met Anguiano during April and May outside the plant. In late April or early May, Alexander observed Puente's car circling in and around the Respondent's parking lot and reported his observation to Sikes. Sikes went out to the car (which had stopped) and asked Puente if he could help him. Puente identified himself, gave Sikes his business card, and stated he was there to meet with employees of the Respondent. Sikes advised Kelly and Gutierrez of Puente's statement and identity.

5. The employee's independent effort to secure increased wages and benefits

Prior to the start of the May 30 workshift, a group of employees assembled outside the offices of Sikes and Gutierrez shouting they wanted a wage increase. Sikes informed the group Gutierrez was not in, suggested they select one or two among their number to speak on their behalf, go to work, and promised he and Gutierrez would meet with their representative(s) when Gutierrez arrived. The employees acquiesced, chose Julio Manzzyni and Rodolfo Salinas (who were fluent in both Spanish and English, while most the employees were fluent only in Spanish) to present their demands and elicit management response thereto, and went to work.

When Gutierrez arrived at the plant, he, Sikes, Pena, and Alexander met with Manzzyni and Salinas in Gutierrez' office. The employee representatives stated the employees wanted a $1 raise, health insurance for the employees and their dependents, free knives, and free luggers.[16] Gutierrez responded the employees were going to receive a 25-cent increase;[17] the Respondent could not afford a $1 increase at that time; the Respondent would have to look into and get back to the employees with respect to health insurance, because it was contemplating giving employee coverage but not dependent coverage; and that he would get back to the employees with respect to the luggers and knives. The employee representatives stated 25 cents was not much. Gutierrez replied it was all the Respondent could afford; recent plant improvements were costly; the Respondent had only been doing business with Federal for a year and wasn't making money; if the Union came in, any increase above 25 cents would have to be passed on to Federal, Federal was likely to cease doing business with the Respondent rather than paying more (securing confirmation from Salinas, who previously worked for Federal, Federal ceased doing business with other slaughterhouses when they raised their per-head charge) and if Federal did so, the Respondent probably would have to cease operations. Manzzyni commented he thought things could be worked out without the Union and the two employee representatives departed.

Following their departure, the management representatives discussed what had transpired and decided a meeting with all the employees was advisable, to avoid any misunderstandings among the employees concerning what employee demands were made and what management responded.

6. The employee meeting and Gutierrez' alleged unlawful statements

Initially the complaint alleged the meeting was held in late May or early June at the facility and that, in the course of the meeting, either Sikes or Gutierrez made statements which created the impression the Respondent was surveilling the union activities of the employees and threatened employees with plant closure, lower wages, and discharge if they selected Local 770 as their bargaining representative.[18]

During the hearing, counsel for the General Counsel amended paragraph 12 to strike Sikes' name from the allegation and to place the meeting in late June or early July rather than late May or early June.

It was undisputed and I find Gutierrez alone addressed a meeting of all the employees. It was also undisputed and I find Gutierrez, who speaks both English and Spanish fluently, addressed the assembled employees first in Spanish and then in English.[19]

Sikes, Alexander, and employee Nunnie Gray testified concerning Gutierrez' remarks in English; Gutierrez, Manzzyni, and Salinas testified concerning Gutierrez' remarks in English and Spanish; and employees Anguiano, Roberto Frias, Ramon Gonzales, and Jose Ocampo testified concerning Gutierrez' remarks in Spanish.

All 10 were in substantial agreement Gutierrez, while addressing the assembled employees in both Spanish and English, essentially and correctly described the employees' demands and his responses thereto during the conference between the management and employee representatives on May 30.

Sikes, Gutierrez, Alexander, Gray, Manzzyni, and Salinas testified the meeting occurred in the men's locker room inside the plant; that the meeting was conducted on May 30, following the May 30 conference between the management and employee representatives earlier described; and that management neither scheduled nor conducted any further or other general employee meetings to discuss the employees' demands and management response thereto. The plant sec-

[14] As noted above, Local 770 represented Federal employees working within Respondent's slaughterhouse.

[15] According to Anguiano, they began to actively distribute and solicit in June.

[16] As noted above, Franco collected rents for the luggers and sold the knives from the Respondent's stores.

[17] A 25-cent general wage increase was placed in effect on June 3.

[18] Par. 12.

[19] Sikes, Alexander, and a few employees neither spoke nor understood Spanish; Gutierrez, Manzzyni, and Salinas were fluent in Spanish and English; the balance of the work force were fluent in Spanish but limited in their ability to speak and understand English.

retary, Emma Trujillo, also testified only one meeting occurred.

Although Anguiano corroborated the testimony of the witnesses just named that Gutierrez conducted a meeting of the Respondent's employees in the plant locker room at which he made the statements outlined above, he claimed the meeting was held in early June; claimed Gutierrez conducted a *second* employee meeting in early July outside the plant at which he stated: the insurance was too expensive and was not going to be provided; if he saw anyone distributing or signing union authorization cards, they would be fired; if the employees were dissatisfied ''Bandini'';[20] a slaughterhouse in the area closed because of the Union and another was about to close; and if the employees kept trying to secure union representation, the Respondent's plant would close.

In his direct testimony, Frias claimed Gutierrez conducted a meeting in late May or early June in the parking lot at which he stated the Respondent was going to lower the cost of the knives, not charge for the luggers, would give an answer in about a month about insurance, and was going to increase wages by 25 cents per hour. Still on direct, he testified Gutierrez conducted a second meeting in the plant's locker room at the end of June at which Gutierrez stated there wasn't going to be any insurance; if the employees were dissatisfied, they could leave; the Union was bad for the Company; any employees seen distributing or signing union cards would be fired; and if the employees continued to seek union representation, the plant would close. On cross-examination, however, he stated Gutierrez only conducted one meeting and that was in early July.

Gonzales' testimony followed that of Anguiano concerning a first meeting with the employees allegedly in early June, that it took place in the locker room within the plant, and that Gutierrez made the statements at that meeting. Sikes, et al. testified to but departed from Anguiano's testimony concerning an alleged second meeting, stating it also took place at the locker room; that the meeting took place on June 15; and that at the alleged second meeting Gutierrez told the employees he was going to lower the price of the knives, he was not going to charge for luggers; and that Respondent was negotiating about the insurance. Gonzales departed further from the testimony of Anguiano and Frias in stating Gutierrez conducted a third meeting in early July outside the plant at which Gutierrez stated the Union was not good for the employees; the Respondent could not afford a union; if the employees were dissatisfied with that, ''Bandini''; if the Union came in, the Respondent would close; and if he saw anyone distributing or signing union cards, they would be fired.

Ocampo's testimony also followed that of Anguiano with respect to the date and place of Gutierrez' meeting with the employees—in early June in the plant locker room—but deviated in adding that, after Gutierrez stated the employees were going to receive a 25-cent-per-hour increase and that he would get back to the employees with respect to the insurance, Gutierrez stated the luggers were going to be free and the price of the knives were going to be reduced by 50 percent. He also claimed a second meeting occurred in early July, but placed it outside the plant and stated Gutierrez limited his statements at the alleged second meeting to informing the employees the Respondent needed another month to check out insurance companies and departed further from the others in stating Gutierrez conducted a third employee meeting in the same time period—early July—to state the Respondent was not going to give any insurance; if they were dissatisfied, ''Bandini''; he did not want to see anyone distributing or signing union cards; and if he observed any employee doing so, he would be fired.

The pretrial affidavits executed by Auguiano et al. make no mention of the statements attributed by Anguiano, et al. to Gutierrez at the alleged employee meetings subsequent to the meeting all agree Gutierrez repeated what had transpired at the May 30 conference between the employee representatives and the management representatives and the above recitation of the testimony of Anguiano, et al. is shot through with glaring contradictions, inconsistent statements, and improbabilities.[21]

Sikes, Alexander, Manzzyni, Salinas, Gray, and Trujillo all supported Gutierrez' denial he conducted any employee meetings after the meeting Gutierrez conducted following the May 30 conference between the employee and management representatives[22] and thus Gutierrez' denial he made the statements attributed to him by Anguiano, Frias, Gonzales, and Ocampo at any alleged subsequent meeting.

On the basis of the foregoing, I find Gutierrez conducted one employee meeting; conducted it on May 30 at the plant locker room; and confined his statements to: (1) an announcement the employees were going to receive a 25-cent wage increase; (2) a promise to get back to the employees with respect to their requests for employee and dependent health insurance, free knives, and luggers; and (3) statements: (a) if the employees secured union representation, any increase above 25 cents would have to be passed on to Federal; (b) Federal would likely cease doing business with the Respondent if the Respondent increased its per-head charges; (c) if Federal did so, the Respondent probably would have to cease operations; and (4) Gutierrez did not make the additional statements attributed to him by Anguiano, Frias, Gonzales, and Ocampo at the May 30 or any later employee meeting.

7. Acceleration of Local 770's organizational campaign

Dissatisfied with the wage increase and benefits granted the employees after the May 30 conference[23] and the lack of word concerning insurance coverage, during June and July Anguiano, Beltrano, and Thornton actively pursued the se-

[20] Bandini was the name of the street on which the plant was located.

[21] It was established, and I find, the Respondent secured data from the employees in June concerning the number and ages of their dependents and related information for the purpose of soliciting bids from insurance carriers for employees and dependent coverage; submitted the data to the Respondent's insurance broker for compilation of the data and submission to insurance carriers for bidding; and the broker conveyed the bids received to the Respondent in mid-July.

[22] Kelly and Ebright, who were unavailable at the time Sikes and Gutierrez decided to and held the employee meeting following the May 30 conference, instructed Sikes and Gutierrez to refrain from conducting any further employees' meeting without their authorization and approval.

[23] The 25-cent increase was effected June 3 and about the same time Gutierrez instructed Franco to cease charging for the luggers and to reduce the price of the knives by 50 percent.

curing of signed cards from the Respondent's employees authorizing Local 770 to represent them for collective-bargaining purposes, secured a substantial number of signed cards, and turned them over to Local 770.

Local 770 Representative Rodriguez also approached Federal President Bauer to request Federal increase its per-head payments to the Respondent so the Respondent could increase its employees' wages and benefits. He also solicited Bauer's help in securing Local 770's recognition as the collective-bargaining representative of the Respondent's employees.

Bauer responded he could not afford to increase his per-head payments and expressed willingness to act as a go-between or mediator between Local 770 and the Respondent, but no more.

Bauer advised Kelly of Rodriguez' request and his responses.

8. The alleged July 18 unlawful written statement or notice

The complaint (par. 14(a)) alleged the Respondent violated Section 8(a)(1) of the Act by distributing and posting a memorandum to employees threatening the employees with plant closure if they selected Local 770 as their bargaining representative.

On July 17 and 18, Local 770 circulated among the Respondent's employees an invitation to attend a meeting at 6 p.m. on the latter date at a restaurant near the plant.

Kelly received a copy of the invitation and, after conferring with Ebright and outside labor counsel, prepared the following statement:

NOTICE

AUTHORIZATION CARDS

> We have been informed that the United Food and Commercial Workers Union wants to organize the employees of JMA Holdings and gain representation (the right to represent the employees in wage and benefit negotiations with the company). It undoubtedly will ask you to sign authorization cards.
>
> We advise you to be very careful about signing anything that you do not fully understand, such as authorization card or any other paper, including an attendance list. Do not allow anyone to pressure you or force you into signing anything, for this is a very serious matter. Federal law, under the National Labor Relations Act, protects your right to engage in *or not to engage in Union activity*. You do not even have to talk to the union.
>
> You may be told that an authorization card does not mean too much, that it just allows you to be informed. Or that you will be put on a mailing list. Or that everyone else has signed one. Or that it is not binding. Or that you will have an election anyway. Or that it will mean a wage increase. *None of these statements are true*. The signing of an authorization card can mean that you will be selecting the Union as your representative without having an election or any further input.
>
> Read the card, or anything else that you are asked to sign, carefully. It may make you part of the Union and if the Union obtains a majority of these cards it can demand recognition and, in some cases, it can force itself upon you and the Company without an election of all the employees.
>
> We do not believe that the Union is in the best interest of either JMA Holdings or its employees. As you know, many meat plants have closed or are scheduled to close in Southern California due to economic problems. We are trying to keep JMA Holdings in business while working with our employees to improve wages and benefits. We recently granted a general wage increase and as we told you, we are getting quotes for a health insurance program.
>
> We hope you will ask the right questions and carefully consider all of the issues before making any decision or signing anything. [G.C. Exh. 4.]

Kelly had Gutierrez prepare the same statement in the Spanish language and distribute it to all the employees as they left work on July 18, prior to the Local 770 meeting.

9. The July 18 Local 770 meeting

The Local 770 meeting was held as scheduled and attended by a substantial number of the Respondent's employees. The meeting was chaired by Local 770 Director of Organizing Tom Clark, who was accompanied by Local 770 Representatives Puente, Elizabeth Pulido, Elizabeth Robinson, and Jesse Martel. Because Clark neither spoke nor understood Spanish, Pulido acted as his interpreter.

Clark secured from the employees their assurance they desired Local 770 representation and explored their reasons therefor. The employees recited: a desire for a $1 increase; their opinion the 25-cent increase they received in June was insufficient; their desire for health insurance coverage for themselves and their dependents; a complaint the Respondent told them it was considering such coverage and would get back to them about it, but had not done so; and a complaint they were constantly pressured to work faster. Clark advised the employees Local 770 wanted to represent them; Local 770 was going to seek recognition as their representative from the Respondent and to petition for an election; it would take 4 to 6 weeks for the election; and that the Respondent would probably try to scare them during the wait.

Anguiano responded the Respondent was already doing that; the Respondent was saying if its costs increased, it would have to pass them on to Federal; Federal was unlikely to agree and might cease doing business with the Respondent; and if it did, the Respondent might have to cease operations. Anguiano also stated he feared he and his coorganizers would be fired during the wait and the employees could not wait 4 to 6 weeks.

Clark stated the only alternative to the wait was strike action and the employees began calling for that action.

One of the Local 770 representatives commented it was a propitious time, because Federal had many cattle awaiting slaughter.

Clark expressed reluctance to support a strike but yielded when the employees demanded a strike vote.

A vote was conducted, passed overwhelmingly, and preparations for a strike commencing the following day began.

10. The commencement of the strike and Local 770's demand

Prior to the start of the July 19 workshift, Local 770 began picketing the plant. Forty-four employees went on strike and manned the picket lines.[24] The Respondent's managers began recruiting replacements for the strikers and continued operations with nonstriking employees, recruited replacements, and returnees.

Rodriguez contacted Kelly during the morning of July 19 and presented Kelly with a written request addressed to Androli and signed by Local 770 President Ricardo F. Icaza stating a majority of the Respondent's employees within an appropriate unit signed cards authorizing Local 770 to represent them for bargaining; demanding recognition as the exclusive representative of the unit employees; and offering to prove Local 770's majority representative status through a card check conducted by an agreed-on impartial third party.

Kelly refused to recognize Local 770 without Board certification of a majority of the Respondent's employees within an appropriate unit voted in a Board-conducted election for Local 770 representation.[25]

11. The alleged unlawful Alexander statements

The complaint alleged on July 18 Alexander interrogated employees at the facility about their and other employees' union activities and sympathies, gave employees the impression the Respondent was surveilling employee union activities, and threatened employees with plant closure if the employees selected Local 770 as their bargaining representative (pars. 13(a), (b), and (c)). The complaint also alleged on July 20 Alexander misrepresented to employees it was unlawful for them to engage in a strike and again threatened employees with plant closure if they selected Local 770 as their bargaining representative (pars. 15(a) and (b)).

Employee Valbina Cabachuala testified Alexander telephoned her the evening of July 18 and asked her if her brother-in-law (Everardo Cortez) attended the July 18 Local 770 meeting; she replied she did not know; Alexander said he was sure Cortez was there, ''Albino'' told him so; the employees were fools, if the Union came in, wages would be lowered, the plant might close and asked her if she signed a union card; she replied no and asked why he wanted to know; and Alexander responded the Respondent was going to fire anyone who signed a union card, Thornton was trying to persuade employees to sign and was going to be fired.[26]

Cabachuala further testified Alexander called her again on July 20, the day after the strike began and asked her when she was going to return to work; she replied when the rest of the employees returned to work; Alexander stated the strike was illegal, the employees were first supposed to have an election; if the employees did not return to work on July 21, they would be let go; and if they wanted to return to work later, there wouldn't be any jobs available.

On questioning by counsel for Local 770 following the completion of the General Counsel's direct examination, Cabachuala further testified on three or four occasions on the plant floor during the week prior to the strike, Alexander asked her who signed union authorization cards; she said she did not know; and Alexander stated he knew who they were and, if they continued, the plant would close.

Alexander denied he telephoned Cabachuala on July 18 and made the remarks attributed to him; denied he questioned Cabachuala at any time prior to the strike concerning the identity of any union card signers and expressing any awareness of who signed cards; stated his only communications with Cabachuala around July 18–20 occurred on July 19 when he encountered Cabachuala at the plant office when he asked her if she was going to come to work, to which she replied negatively, saying she was going to join the strike,[27] and a telephone conversation on the same evening (July 19), when he telephoned Cabachuala and asked her to return to work the following day; she refused, stating she supported the strike; and he told her she was foolish to give up her job, it might not be available later.

Cabachuala's two pretrial affidavits made no mention of any July conversation with Alexander and did not contain reference to any questioning or comments by Alexander during the week prior to the strike; she contradicted herself with respect to Alexander's alleged comments concerning Thornton; and she was an unconvincing witness, while Alexander's testimony was clear, candid, and convincing.

I credit his testimony and find Alexander spoke to Cabachuala at the plant office and by telephone on July 19, after the strike commenced, and limited his statements to requests she come to work and a comment she was foolish to give up her job, because it might not be available later,[28] and that he did not make the other statements attributed to him by Cabachuala on July 18 and 20 and during the week preceding the strike.

Following the completion of their responses to questions addressed to them by the General Counsel, counsel for Local 770 elicited from Gonzales and Ocampo testimony to the effect on two occasions prior to the strike they encountered Alexander in the parking lot outside the plant, but contradicted each other on what transpired thereafter.

Gonzales testified Alexander spoke in English during the first encounter; that the encounter took place in the parking lot 2 or 3 days after the alleged last meeting Gutierrez conducted in the parking lot;[29] that he was on a break and in Ocampo's company; and that Alexander stated: the Union is no good for you; he asked why not; Alexander replied you would pay lots of money every month for the Union; that was all he heard Alexander say; and he then returned to work.[30]

---

[24] A few more joined the strike later, and several returned to work.

[25] This was the first time Rodriguez or any other representative of Local 770 made any contact with a representative of the Respondent's management concerning the organization or representation of the Respondent's employees.

[26] On cross-examination, however, Cabachuala testified Alexander told her he did not think Thornton was soliciting employees to sign cards.

[27] Cabachuala testified she joined in the picketing of the plant which commenced the morning of July 19.

[28] It was undisputed the entire management team made strenuous efforts to recruit a sufficient work force to maintain operations when the strike commenced, including efforts to persuade all the employees to return to work.

[29] Ocampo testified the alleged final employee meeting conducted by Gutierrez in the parking lot occurred between July 6–9.

[30] Both Gonzales and Ocampo testified Alexander spoke in English; Gonzales conceded he understood and spoke English, and gave the testimony just recited in English.

Ocampo initially testified through an interpreter, stating he was fluent in Spanish but had little understanding of and ability to speak English. He, like Gonzales, testified the two encountered Alexander in the parking lot 2 or 3 days after attending an alleged meeting of the employees and Gutierrez in the parking lot between July 6–9; that Gonzales, who was on a break,[31] was also present; but departed diametrically from the balance of Gonzales' testimony to what Alexander allegedly said, saying Alexander asked what the two thought about the Union; asked if the two were going to sign union cards; when they replied no, stated the Union was not good for the Company; the only thing the Union wanted was their money; the Union was not going to give them any benefits; they should continue as is, because with the Union, the Company might close; and that the Company could fire them if they were seen signing a union card.

Ocampo sought to explain his ability to testify concerning what Alexander said in English despite his proclaimed inability to understand English by stating Gonzales understood and could speak English and translated to him what Alexander was saying.[32]

Gonzales testified the two encountered Alexander a second time in the parking lot; the encounter took place during the week following the first meeting;[33] Estrada was also present; Alexander spoke in English; and Alexander told them the Union was no good for them; asked how much money they made; he replied $7.75 per hour; Alexander stated he had it on paper in a June contract with the Union they would lose money, receive between $6–$8 per hour; asked Gonzales if he signed a union card and he replied no; asked Ocampo if he signed a union card, Ocampo asked him what Alexander was asking, he translated Alexander's question to Ocampo in Spanish, and Ocampo replied no; Alexander stated, ''all right, you're my main man''; Alexander stated if he caught anyone signing a union card, ''Bandini, no mas trabajo'';[34] if he saw anyone signing a union card, ''Bandini''; and that Estrada then, in Spanish, stated the Company was going to fire anyone caught distributing union cards.

Ocampo placed the second alleged meeting with Alexander in the parking lot on July 15 or 16; his testimony conformed to that of Gonzales in that he testified Estrada was present at the alleged second meeting and that Alexander asked the two again if they had signed union cards but alleged (despite his alleged inability to understand and speak English) *he* responded they had not signed to avoid having any problem with Alexander and Gonzales responded by stating how could Alexander believe they were going to sign, they were working for him; and Alexander told them to be careful about signing because if they were seen distributing or signing cards, they could be fired.

Ocampo again sought to explain his ability to testify concerning Alexander's questions and statements by stating Estrada translated for him.

Gonzales conceded he discussed what Ocampo testified to following the completion of Ocampo's testimony (Ocampo concluded in the afternoon and Gonzales testified the following day) and that their alleged conversations with Alexander did not appear in their pretrial statements. Ocampo claimed he never related the alleged Alexander conversations to any NLRB or Local 770 representative prior to testifying.

Alexander confirmed an encounter with Estrada, Gonzales, and Ocampo in the parking lot in July. He stated while he was in his car, he saw the three in the parking lot, with Estrada and Ocampo awaiting Gonzales' completion of his workshift (because the three were in a carpool) and that when Gonzales asked him what he thought about the Union, he stated it was his opinion if the Union came in, they would have to pay union dues, Shamrock under its contract with the union was paying $6.80 per hour while they were making $7.50 to $8 per hour, so they would make less money than they were currently earning, and pointed out Shamrock and JMA were the only slaughterhouses left in the area. He stated he could not recall any second encounter, and denied at any time he stated the plant would close if the Union came in; if he or management saw them distributing or signing cards, they would be fired; asked them if they signed union cards; stated he would fire anyone he caught signing a union card, or that it would be ''Bandini'' if he did; stated he was unfamiliar with the phrase ''no mas trabajo'' and did not know what it meant in English; and denied he said or used the phrase ''all right, my main man,'' stating the employees used that phrase in referring to him. He also stated he used the word ''Bandini'' in the plant regularly, with respect to what would happen to employees if their unsatisfactory work performance did not improve.

Alexander's testimony that the two told him they were employed by Local 770 as paid pickets was uncontradicted and is credited.

In view of the contradictions in the testimony of Gonzales and Ocampo, the failure of any supporting evidence, and severe doubt of their credibility as well as their uncertain demeanor while testifying, as contrasted with Alexander's firm and convincing testimony, I find Alexander did not make the statements and ask the questions attributed to him by Gonzales and Ocampo other than the remarks attributed to him by Gonzales at their first encounter and Alexander's corroboration thereof.

12. The alleged unlawful July 20 notice to strikers

The complaint (par. 14(b)) alleged the Respondent violated Section 8(a)(1) of the Act by a July 20 distribution to striking employees of a notice to the effect they would be offered reinstatement to future job openings in the event they unconditionally offered to return to work.

It is undisputed on July 20 Ebright, after consultation with outside labor counsel, prepared the following document, had it translated into Spanish, and caused its distribution to striking employees when they came to the plant to pick up their paychecks for their work the preceding week. The document read as follows:

> July 20, 1990
> Dear Employee:
>
> As you are aware the United Food and Commercial Workers Union Local 770 is attempting to organize you, the employees of our company. The Union has demanded that the Company recognize the Union as the representative of our employees without having the nor-

[31] Though earlier stating they had both finished work.

[32] Gonzales did not confirm he gave a running translation of any of Alexander's comments during the alleged first meeting.

[33] He later placed it on July 10.

[34] In English, no more work.

mal election where all employees may use a secret ballot to make their choice.

The proper procedure in situations such as this is for the employees to have an election, utilizing a secret ballot and supervised by the National Labor Relations Board. If our employees voted for Union representation in such an election, we would recognize the Union and negotiate with them. If the Union truly represents a majority of our employees, they would call for such an election. In our response to the Union on Thursday we stated ''that the best method for determining employees' desires is through the election process of the National Labor Relations Board.''

Since the Union has formed a recognition picket line which many of our employees have failed to cross, you should know the following:

1. Federal law protects the rights of employees to strike or *not* to strike.

2. Employees who refuse to cross a picket line are *not* paid for the time they are not working.

3. Employees who refuse to cross this type of picket line are *not* entitled to unemployment compensation.

4. In a strike of this nature, the Employer has the right to hire permanent replacements to fill the positions of employees who strike or refuse to cross a picket line. At the end of the strike, the permanent replacements have a right to remain in the job positions of the striking employees. The only right that the striking employees would have, if they have been replaced, is to be put on a preferential hiring list for future job openings.

It is JMA Holdings' intent to continue working. We are hiring employees to fill the jobs of the striking employees. We are placing advertisements in the newspapers for replacement employees. We expect to be back to full production within the next few days. We urge you to return to work. *Returning to work does not prevent the Union from having a normal recognition election. We believe that it is in your best interest to return to work.* [G.C. Exh. 6.]

13. The July 24 notices to strikers and their replacements

The complaint (par. 14(c)) alleged the Respondent violated Section 8(a)(1) of the Act by distributing to employees who made unconditional offers to return to work a memorandum stating they would be offered reinstatement to future job openings.

It is undisputed on July 23 Ebright, again after consultation with outside labor counsel, prepared the following document, had it translated into Spanish, and caused its posting (on the fence adjacent to the gate) and distribution to striking employees on July 24. The document read as follows:

NOTICE

Date: July 24, 1990
To: All Employees Engaged in the Present Work Stoppage

As we previously informed you, JMA Holdings has been hiring permanent replacements to perform the work of those of you who have been engaged in a work stoppage. This process is continuing and we have filled most of the job positions.

There are still some job positions that have not been filled. Any employee who has the required job skill for those open positions may return to work. Once all of the available jobs have been filled, all employees who have not returned to work will be put on a preferential hiring list and will be eligible to return to work only when opening exists. [G.C. Exh. 8.]

On the same date (July 23), Ebright prepared and caused the July 24 posting and distribution of the following document (in Spanish and English) to employees hired as replacements for the strikers during the strike:

INTEROFFICE MEMO

Date: July 24, 1990
To: All Recently Hired Employees
Subject: Permanent Employment

All employees who have been hired during the current work stoppage are being made permanent employees. All such employees will be required to pass the company's pre-employment physical, which includes drug screen, and to complete all other parts of the normal hiring process. Any employee who fails to pass the physical will be terminated. The physical will be scheduled over the next few weeks as the normal work schedule permits.

All permanent employment by the Company is ''AT WILL,'' which means that the Company reserves the right to terminate any employee for any reason at any time. [G.C. Exh. 7.]

Consistently during the strike and pursuant to management's instructions, Gutierrez, the leadman, and Trujillo assured the employees hired to replace the strikers they were hired as permanent employees, replacing the strikers; the July 24 notice published, posted, and distributed to both the strikers and to the replacements prior to Rodriguez' July 24 advice to Kelly the strikers wished to return to work, formally publicized that policy.

14. The offers to return to work

Subsequent to the July 24 posting and distribution of the July 24 notices described above, Rodriguez telephoned Kelly, stated he was speaking on behalf of the strikers, and stated the strikers wanted to return to work. Kelly responded the Respondent did not recognize Local 770 as the representative of its employees; permanent replacements had been hired for the strikers and the Respondent was willing to place strikers who wished to return to work on a preferential hiring list.

On July 25, Local 770 circulated a petition among the strikers wherein, in English and Spanish, the signatories unconditionally offered to return to work. The petition was signed by 42 striking employees.

The petition was presented to Kelly.

Following its presentation, Gutierrez and Pena set up tables outside the plant and, as strikers approached, tendered any wages due to each striker as he or she approached and

had such striker list his or her name and address for placement on a preferential recall list.

15. Reinstatements and terminations following the strike

Prior to the strike, the Respondent employed approximately 80 production and maintenance employees. Approximately 44 went on strike on July 19, a few more joined the strike prior to its July 25 cessation, and several (about 9) strikers returned to work prior to July 25. During the strike, the Respondent hired 39 new employees as striker replacements. On July 26, three strikers were recalled; on July 27, another striker was recalled; on July 29, one employee terminated; on July 30, two strikers were recalled; on August 8, one employee terminated; on August 12, four employees terminated; on August 26, two employees terminated; one striker was recalled on an undetermined date in August; one employee terminated on September 2; one employee terminated on September 9; and one striker was recalled on September 12.

Between the July 25 strike cessation and the September 23 plant closure, the Respondent, in accordance with its previous practice, on August 13 hired five casuals for that day, replacing sick or absent employees, and employed a sixth casual for 2 days, August 13 and 14, for the same purpose.

Between July 25 and September 23 (other than the employment of casuals just noted) all additions to the work force were accomplished by recalling strikers from the preferential recall list, on the dates listed above.

16. Plant closure

On September 20 Federal informed the Respondent it couldn't continue in business and would cease supplying cattle for slaughter after the following day. Federal ceased operations at the Respondent's plant and at another location on September 21. The Respondent, with no customers for its slaughtering operations, laid off its entire work force the next day. The Respondent has not resumed operations since.

B. *Analysis and Conclusions*

1. Estrada

Estrada was hourly paid, punched a timeclock, was paid overtime, and spent over 90 percent of his time butchering cattle on the kill floor, in a variety of jobs, due to his versatility and ability.

Alexander, by contrast, was salaried, did not punch a timeclock, received health insurance coverage (which Estrada did not receive), and did not perform any production work.

Estrada was classified as a leadman, trained new employees, exhorted employees to work faster and more efficiently in order to maintain a desirable flow of production, and transmitted Alexander's directions concerning employee work assignments, transfers, etc., to the predominantly Spanish-speaking work force, on occasion substituted for Alexander during the latter's absence, and screened Spanish-speaking job applicants for employment as casual labor.

Estrada did not discipline employees and any recommendations for discipline he made were reviewed by Alexander and/or Gutierrez, who made the final decision as to whether to discipline and what discipline to impose. He did not evaluate the employees' work performance, and did not authorize time off or overtime.

On these facts, I conclude Estrada was not a supervisor of the Respondent acting on its behalf within the meaning of Section 2 of the Act, nor an agent of the Respondent authorized to act on its behalf other than in transmitting orders and directions issued by Alexander or Gutierrez to Spanish-speaking employees.

2. The alleged Gutierrez violations

Inasmuch as I have entered findings at the sole employee meetings Gutierrez conducted at the facility on May 30, he did not make any statements which created the impression the Respondent was surveilling the union activities of its employees or threatened employees with lower wages and discharge if they selected Local 770 as their bargaining representative, I conclude the Respondent did not violate the Act as alleged in paragraphs 12(a) and (b) of the complaint.

The complaint also alleges, however, in paragraph 12(b), Gutierrez at the employee meeting violated Section 8(a)(1) of the Act by threatening employees with plant closure if they selected Local 770 as their bargaining representative.

This allegation is based on Gutierrez' statement, while conducting the May 30 meeting, if the employees selected Local 770 as their bargaining representative in the belief Local 770 would secure a wage increase for them exceeding the 25-cent increase they were going to receive and Local 770 on their behalf insisted on a larger increase, the Respondent would have to pass on the resulting increased cost to Federal, it was unlikely Federal would agree to increase its per-head payments to Respondent for custom-slaughtering Federal's cattle, Federal might withdraw its business, and in that case the Respondent would probably have to cease operations.

Gutierrez' comments were accurate predictions of what could and possibly would occur, for the employees voiced their dissatisfaction over the size of the June increase to Gutierrez (through Manzzyni), Rodriguez pressed Bauer to increase his per-head payments so the employees' wages could be increased, and Federal, like many of its predecessors, was forced to cease its operations even without an increase in its per-head payments.

Such predictions, based on facts similar to those developed in this case, have been held nonviolative of the Act.[35]

I therefore conclude by Gutierrez' May 30 remarks recited above, the Respondent did not violate the Act.

3. The alleged unlawful July 18 notice

The complaint alleged the July 18 notice distributed to the employees by the Respondent violated Section 8(a)(1) of the Act by threatening the employees with plant closure if they selected Local 770 as their bargaining representative.

Apparently[36] this allegation is founded on the following statements contained in the notice:

[35] *Auto Workers v. NLRB*, 834 F.2d 816 (9th Cir. 1987); *Benjamin Coal Co.*, 294 NLRB 572 (1989); *C-Line Express*, 292 NLRB 638 (1989); *Hoyt Water Heater*, 282 NLRB 1348 (1987).

[36] Neither the General Counsel nor Local 770 advanced any argument in their posthearing briefs stating what language of the notice they relied on as supporting the complaint allegation.

> As you know, many meat plants have closed or are scheduled to close in Southern California due to economic problems. We are trying to keep JMA Holdings in business while working with our employees to improve wages and benefits.

It was undisputed most slaughterhouses in the area closed prior to July due to economic problems, leaving only JMA and Shamrock still in business. The notice contained no threat JMA was contemplating plant closure.

I therefore conclude the Respondent did not violate the Act by distributing this notice to the employees.

4. The alleged Alexander violations

The complaint alleged the Respondent violated Section 8(a)(1) of the Act by statements Cabachuala, Gonzales, and Ocampo attributed to Alexander on July 18 and 20 (as well as additional statements attributed to Alexander by the three on other dates in July).

I have entered findings Alexander did not utter the statements attributed to him by the three.

I therefore conclude the Respondent did not commit the acts alleged in paragraphs 13(a), (b), and (c) and 15(a) and (b) of the complaint.

5. Characterization of the strike

I conclude the strike was economic. At the July 18 meeting between Local 770 representatives and the employees, Clark was reluctantly forced to accede to the assembled employees' desire to go on strike immediately rather than await the outcome of a Board-conducted election after the employees expressed their dissatisfaction over the concessions the Respondent granted following their independent effort to secure wage and benefit improvements and it was noted both Federal and the Respondent were vulnerable at that time (due to the substantial number of Federal's cattle awaiting processing). Although Anguiano's expressed fear he and his coorganizers among the employees might be fired if the employees awaited an election supported his call for an immediate strike, his emotional appeal was not based on evidence any such threat was addressed to any of the three by the Respondent.

Inasmuch as I have concluded above the Respondent did not commit the acts alleged as violative of Section 8(a)(1) of the Act, I further conclude the Respondent did not by any of its actions cause or prolong the strike.

6. The alleged unlawful July 20 and 24 notices

The complaint alleged the Respondent violated Section 8(a)(1) of the Act by distributing to its striking employees a notice they would only be considered for future job openings in the event they made unconditional offers to return to work.

The General Counsel relies on the following language of the letter addressed and delivered to its striking employees by the Respondent on July 20 as basis for the allegation:

> 4. [T]he Employer has the right to hire permanent replacements to fill the positions of employees who strike or refuse to cross a picket line. At the end of the strike, the permanent replacements have a right to remain in the job positions of the striking employees. *The only right that the striking employees would have, if they have been replaced, is to be put on a preferential hiring list for future job openings*. [Emphasis added.]

Had the strike been an unfair labor practice strike, the notice was erroneous, for an unfair labor practice striker has the right, on his unconditional offer to return to work, to immediate reinstatement to his former job, even if this requires the termination of the employee hired to replace him during the strike.

The General Counsel contends, however, presuming the strike was an economic strike, the notice is still erroneous, because it states the striker who unconditionally applies for reinstatement only has a right to reinstatement to fill a job which becomes available thereafter, failing to state he also has a right to reinstatement to fill a job which is available at the time he makes his offer, i.e., an existing job vacancy.

Clearly the Respondent at all times, including the time at which it prepared and distributed the notice, considered the strike to be economic and, reading the entire notice, urged the striking employees to return to work before their replacements were hired with the correct advice that, once a full work force had been recruited (as it had at that time), an offer to return to work would result in reinstatement thereafter as future job vacancies occurred.

I therefore conclude the Respondent did not violate the Act by correctly advising the strikers their reinstatement following their unconditional offers to return to work would occur as and when vacancies thereafter developed.

The complaint also alleged the Respondent violated Section 8(a)(1) of the Act by again distributing to its striking employees a notice those strikers who made unconditional offers to return to work would be reinstated to future job openings.

The notice in question stated:

> There are still some job positions that have not been filled. Any employee who has the required job skill for those open positions may return to work. *Once all the available jobs have been filled, all employees who have not returned to work will be put on a preferential hiring list and will be eligible to return to work only when a job opening exists*. [Emphasis added.]

The General Counsel advances the contentions set out in the preceding section as the basis for a conclusion by publication and distribution of the notice the Respondent violated the Act, and for the reasons stated above, I reach the same conclusion set out above.

7. The alleged unlawful failure or refusal to reinstate

Contending strikers had not been permanently replaced at the time they tendered their unconditional offers to return to work, the complaint alleges the Respondent violated the Act by failing to reinstate them on receipt of their offers.

Prior to Rodriguez' contact with Kelly on July 24 to transmit the message the employees wanted to return to work, the Respondent, both verbally and by a written notice addressed to both the strikers and the replacements, consistently advised both strikers and their replacements the latter were hired as permanent replacements for the former.

When Rodriguez contacted Kelly on July to transmit the foregoing message, Kelly advised Rodriguez the Respondent was fully staffed[37] and the strikers would be offered reinstatement as and when vacancies in the existing work force occurred, and filled all subsequent vacancies with strikers from the preferential recall list prepared on the Respondent's receipt of pertinent information concerning the identity, addresses, and telephone numbers of the strikers wishing to return to work (other than the 1- to 2-day fill-ins with casuals for employees sick or absent, in accordance with past practice).

The recall procedures followed by the Respondent after the strike ended fully complied with the mandates of the Act.

I therefore conclude the Respondent did not violate the Act by following those procedures.[38]

CONCLUSIONS OF LAW

1. At all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce and Local 770 was a labor organization within the meaning of Section 2 of the Act.

2. At all pertinent times Kelly, Ebright, Sikes, Gutierrez, and Alexander were supervisors and agents of the Respondent acting on its behalf within the meaning of Section 2 of the Act.

3. At all pertinent times Estrada was not a supervisor and agent of the Respondent acting on its behalf within the meaning of Section 2 of the Act.

4. The Respondent did not violate Section 8(a)(1) of the Act by Gutierrez' creating any impression among employees the Respondent was surveilling the union activities of its employees or threatening employees with plant closure, lower wages, and discharge if they selected Local 770 as their bargaining representative.

5. The Respondent did not violate Section 8(a)(1) of the Act by any Alexander interrogation of employees concerning their union membership, activities, and sympathies or the union membership, activities, and sympathies of other employees or by creating any impression among employees the Respondent was surveilling the union activities of employees or by threatening employees with plant closure if they selected Local 770 as their bargaining representative or by misrepresenting to employees it was unlawful for them to engage in a strike.

6. From July 19 to 24 employees of the Respondent engaged in an economic strike.

7. During the strike, the Respondent hired permanent replacements for strikers who had gone and remained on strike and notified the replacement employees and the strikers that the replacements were permanent employees and the Respondent was fully staffed with employees who had not gone on strike, abandoned the strike, and returned to work or hired to replace strikers.

8. On its receipt of unconditional offers to return to work from the remaining strikers, the Respondent placed their names on a preferential recall list.

9. The Respondent ceased operations on September 22.

10. All staffing between the time the Respondent received the remaining strikers' unconditional offers to return to work and the time the Respondent ceased operations were accomplished by recalling strikers on the recall list.

11. The Respondent did not violate Section 8(a)(1) and (3) of the Act by failing to recall strikers following its receipt of their unconditional offers to return to work other than through its recalls from the recall list.

12. The Respondent did not otherwise violate the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

The complaint is dismissed.

---

[37] Albeit at a lower level than the level of employment prior to the strike.

[38] *Laidlaw Corp.*, 171 NLRB 1366 (1968), affd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970); *Belknap v. Hale*, 463 U.S. 491 (1983); *Solar Turbines*, 302 NLRB 14 (1991).

[39] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.